

The record considered on appeal is the same as that specifically set forth in the Award of the Administrative Law Judge.

### **STIPULATIONS**

The stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

### **ISSUES**

Although the Administrative Law Judge was asked to and did make decisions involving other issues, the only issue raised on appeal is the nature and extent of claimants disability. The Administrative Law Judge Award found claimants disability to be 15% permanent partial impairment and limited the Award to functional impairment. Claimant contends that even though she worked at a comparable wage for approximately two years after the injury, the record, taken as a whole, supports the finding of an Award based upon work disability.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Appeals Board finds, for the reasons stated below, that the decision of the Administrative Law Judge Awarding 15% permanent partial general disability on a functional basis should be affirmed.

Claimant was injured on March 16, 1990, when she slipped and fell down thirteen stairs while operating a stripper. As she attempted to climb back up the stairs to turn the stripper off, she fell again. She injured her right shoulder and neck. Claimant was examined and treated by a long list of physicians. She was initially treated by Dr. Bailey and at his direction received physical therapy from September 1990, through January 1992. She was thereafter seen by Doctors Wendt, Kopravica, Reintjes, McKinney and Carabetta.

Only Doctors McKinney and Carabetta testified. Dr. McKinney had taken over treatment of claimants condition following preliminary hearing in which client objected to further treatment by Dr. Bailey. Dr. McKinney specializes in physical medicine and rehabilitation. She diagnosed fibromyalgia and prescribed stretching exercises and cold therapy. She stated that in her opinion the fibromyalgia was instigated by injuries claimant received falling on the stairs. She rated the claimant's functional impairment at twenty percent (20%) of the whole body. She recommended claimant not lift over fifteen pounds with her right arm or thirty pounds with both. She also indicated the claimant should limit her working above shoulder level. Her report suggests that she should not work any above shoulder level but in her deposition testimony she modified this restriction to suggest that she should work at above shoulder level only occasionally. She then suggested that if occasional is understood as one third of her work day this may also be more than is reasonable.

Dr. Carabetta also diagnosed fibromyalgia and he rated her disability at eight per cent (8%) of the body as a whole. He indicated that it was not necessary for safety reasons to restrict her in any way. After review of her job duties he suggested that there were no specific activities that he felt she needed to be restricted from performing. He did suggest that if she were to lift something in the neighborhood of seventy-five pounds it would not be advisable and also suggested that she not work overhead for more than two to three minutes at a time.

Following her injury claimant did return to her regular employment with the respondent for approximately two years. Her contract was then not renewed. There is very little evidence of reasons for non-renewal. The only evidence presented is the testimony of Mr. Thomas Conway, the school administrator. He testified that it was his understanding that her contract was not renewed because she had been very short with some of the community members and people visiting the school.

Claimant testified that after her return to work she did not perform certain work duties she had performed prior to her injury. She stated, for example, that she did not run the buffer. She testified that her husband, the head custodian, covered for her and did most of the mopping and vacuuming and carrying of trash. She stated that she did not do much of the cleaning of the chalk boards after the accident and little of the cleaning of the rooms; that her husband did most of the dusting. She did clean spots from the floors and walls, clean sinks and toilets and took out trash from the principals office.

In spite of claimant's testimony the Appeals Board finds that the evidence taken as a whole, indicates claimant could perform her regular duties following her injury with little, if any, accommodation. Dr. McKinney testified that claimant could run the buffer, clean chalk boards, mop floors, empty waste baskets, dust shelves or cabinets, scrub walls, vacuum carpets, clean water fountains, and clean toilets. Dr. McKinney testified she was aware claimant was working during some of the treatment period and she did not take claimant off work. As to the overhead work, Dr. McKinney stated that if claimant cleaned one blackboard, did other things and then went on to the next, it should not be harmful to her.

Dr. Carabetta also testified that claimant could clean hall ways, clean water fountains, dust, mop, move chairs and clean chalk boards. He suggested that if she worked overhead cleaning chalkboards for a minute or so then she should do something else and rotate her activities. He did not find anything specific in her work activities that he felt she could not do.

The school administrator testified that he was familiar with the duties performed by the claimant during the period she worked after the accident. The employment evaluation as of April 22, 1992 was introduced and reflected that she was performing her duties satisfactorily. When asked whether she complained about not being physically able to perform the duties he answered that she complained of headaches and neck aches once in a while but that she did not ever tell him she was unable to do the job.

Both parties introduced testimony from vocational experts. Claimant introduced the testimony of Crystal Ebbert. Ms. Ebbert testified that claimant has lost one hundred per cent (100%) of her access to jobs in the open labor market. However, her calculation was based upon a method or theory which the Appeals Board finds to be inconsistent with the applicable statutory language. Crystal Ebbert's calculation was based upon her conclusion that the claimant is unable to perform any one of the three jobs she had performed prior to her injury. Specifically, according to Crystal Ebbert, claimant is, because of the restrictions recommended by Dr. McKinney, unable to perform her duties as a building custodian and could not perform the duties of her previous jobs as a newspaper delivery person or construction worker. However, K.S.A. 44-510e. defines work disability as reduction in "ability." Crystal Ebbert acknowledges in her deposition testimony that claimant has the ability to do jobs in the light and sedentary categories and even some in

the medium category. She acknowledged that light and sedentary categories include approximately sixty to seventy percent (60-70%) of the jobs. She did not, however, give any other percentage evaluations of work disability based upon any other theory or method. Appeals Board accordingly finds that the testimony of Crystal Ebbert relating to loss of access to labor market should be disregarded.

Ms. Ebbert did project a twenty-five percent (25%) loss of ability to earn a comparable wage. This calculation assumed a \$200.00 per week wage post injury. Ms. Ebbert's opinion regarding loss in wage earning ability was again based on Dr. McKinney's restrictions.

Respondent produced the testimony of Eric Gammon. He testified from the restrictions of Dr. McKinney that claimant has a 38.71% loss of access to the open labor market and a zero per cent projected reduction in ability to earn a wage. From his review of the reports of Doctors Bailey, Wendt, Reintjes, Kopravica and Carabetta he concluded claimant has zero percent loss of ability to earn a comparable wage and zero percent loss of access to open labor market. Gammon's calculation of loss of access to open labor market was based upon Dr. McKinney's restrictions and assumes that pre-injury claimant was able to perform both very heavy and heavy categories of work. He testified that if those categories were eliminated from claimants pre-injury open labor market, the result would be a twenty eight to twenty nine (28-29%) percent loss of access to the open labor market. Even this figure assumes that she is not performing a medium category of work. He testified that he believes she would be able to perform some jobs in the medium category and this factor might further reduce his evaluation by several percentage points.

From a review of the records as a whole the Appeals Board finds claimant has sustained a fifteen percent (15%) permanent partial impairment on a functional basis. This takes into consideration both Dr. Carabetta's rating of eight percent (8%) and Dr. McKinney's rating of twenty percent (20%). The Appeals Board also finds that the record, taken as a whole, does not establish a work disability any greater than the fifteen per cent (15%) functional impairment. Because of the method used for her calculation, Ms. Ebbert's calculation of loss of access to the labor market must be disregarded. Even though Mr. Gammon assigns a 38.71% loss based on Dr. McKinney's restrictions, he assigns a 0% loss based on the reports of the numerous other physicians.

If equal weight is given to the two opinions, one of 38.71% loss of access based on Dr. McKinney's restrictions and 0% based on all other medical opinions, the result is less than the fifteen percent (15%) functional impairment. The loss of ability to earn a wage also appears to be less than the functional impairment. Giving equal weight to Ms. Ebbert's twenty five percent (25%) and Mr. Gammon's zero percent (0%) yields 12.5% loss of ability to earn a comparable wage. The Appeals Board therefore finds that the claimant's work disability is not greater than the fifteen percent (15%) functional impairment and the Award should, in accordance with K.S.A. 44-510e., be based on the fifteen percent (15%) functional impairment.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the decision of the Administrative Law Judge, James R. Ward, dated August 3, 1994, should be same and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994 .

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BOARD MEMBER

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